In the Supreme Court of the United States

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No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of California

Brief *Amici Curiae* for the Bar Association of San Francisco and the Los Angeles County Bar Association in Support of Petitioner

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INTEREST OF AMICI CURIAE

The Bar Association of San Francisco is a voluntary association of approximately 4200 attorneys engaged in public and private law practice in the City and County of San Francisco. It has long been concerned with the lack of a substantial number of minority lawyers, and has sought through various programs and committees to remedy the present racial and ethnic imbalance in the profession.

The Los Angeles County Bar Association is a voluntary bar association of 13,500 members in Los Angeles County. The Articles of Incorporation of the Association lists

among its specific and primary purposes "to advance the science of jurisprudence" and "to promote the administration of justice and the uniformity of legislative and judicial decisions and to apply the knowledge and experience of its members in the field of law to the promotion of the public good."

The Associations' interest in this case follows from the public interest—which the California Supreme Court assumed was "compelling" (see 18 Cal.3d, at 53)— in eliminating the very nearly all-white character of the legal profession. In many parts of the Nation, racial minorities may not have been excluded by the force of law from the Bar; but the effects of past discrimination in a variety of quarters and the present day economic and social realities have produced a Bar in which blacks represent less than 2%, with Chicanos, Indians, and other disadvantaged minorities representing even smaller percentages. The consequences for the Bar, the consumers of legal services, and society as a whole, are disastrous. See Part I, *infra*. Even more alarming is the prospect that the constitutional principles asserted by the court below, if upheld by this Court, will stand as an insurmountable barrier to any meaningful remedy to racial imbalance in the law schools and the Bar. See Parts II(A) and (B), *infra*.

We are convinced that the decision of the court below does indeed imperil the prospects for a meaningfully integrated legal profession within an acceptable period of time. Our Associations are committed to that objective and, whatever the decision of this Court, will work within constitutional limits in conjunction with the law schools and others to remedy the substantial imbalance which now exists. Nonetheless, it is our judgment that thoughtfully

designed and carefully administered minority admissions programs (see Part III(A), *infra*) represent the only realistic possibility for achieving an end to the racial imbalance within the legal profession. Though the decision of the Supreme Court of California was undoubtedly well-intentioned, it threatens that objective and creates the virtual certainty that in our professional lifetimes nearly all of our colleagues will be, as they now are, white.

SUMMARY OF ARGUMENT

I.

The goal of eliminating the substantial racial imbalance in the professional schools is a compelling one. In the legal profession, racial minorities are disproportionately represented; thus only 1% or 2% of all attorneys are black, although blacks are 11.5% of the national population. As a consequence, minorities seldom enjoy the economic rewards of the professions; likewise, racial minorities are largely served by white lawyers, and in many instances simply do not have access to counsel willing and able to serve their needs. And because the legal profession is frequently the source of our political and social leaders, racial imbalance is carried over into those crucial sectors.

II.

Existing admissions standards screen out racial minorities. In one major state-supported law school, for example, admissions standards have so escalated that an average of only one black per year has been admitted pursuant to regular admissions criteria.

Despite the unsupported assertion of the California Supreme Court that there exist alternative means to achieve

racial integration which are racially neutral—that is, "colorblind"—such alternatives simply do not exist. Neither vigorous recruiting efforts nor expansion of the number of students admitted will have more than a *de minimis* effect under present-day admissions standards. And affirmative action programs directed towards persons of "disadvantaged" backgrounds are addressed to a different agenda and will not result in the admission of sufficient numbers of racial minorities to correct the existing imbalance. Programs for "disadvantaged" persons will, therefore, fail to achieve significant racial integration unless "disadvantaged" is treated by admissions personnel as a code for "racial minority"; no court could tolerate such a subterfuge if the Constitution is held to require colorblind admissions practices.

Moreover, the decision of the court below draws a line between schools which have discriminated in the past (in which case racially conscious remedies are not only permitted but often required) and schools not found to have engaged in prior discrimination. That line is both unworkable and unsound. It compels the professional schools to endure the *results* of their own academic admissions standards—the exclusion of all but a handful of minority applicants. And even where there is doubt as to whether the institution has a constitutional duty to desegregate because of past discrimination, the school is restrained from voluntarily taking corrective action absent an adjudication of the issue. The inevitable result will be massive uncertainty and enormous pressures to litigate complex discrimination cases between litigants who would vastly prefer to avoid litigation. Voluntary resolution of integration disputes is virtually precluded.

III.

Amici support affirmative action programs which (1) assure that only academically qualified persons are admitted; (2) function pursuant to openly described, explicitly stated standards and procedures; and (3) are intended to operate as a transitional remedy, with a view towards terminating once the necessity ceases.

Such programs are constitutional. They should not be judged neither by the "compelling governmental interest" test which applies to non-remedial racial classifications (although even judged by that demanding standard a minority admissions program would be constitutional). Nor should the rational basis standard be employed for it provides insufficient judicial oversight. The intermediate standard of review—applied by this Court to sex discrimination cases—is the appropriate measuring rod. Judged by that standard, minority admissions programs are constitutional because they serve "important governmental interests" and are "substantially related to the achievement of those objectives."

ARGUMENT

I.

Correction of Racial Imbalance in the Law Schools and the Legal Profession Is Imperative, Is Supported by Substantial and Compelling Governmental Interests, and Is Therefore a Legitimate Public Policy Objective.

Perhaps it is unnecessary to write at length about the various public interests which are served by the elimination of the indisputably substantial racial imbalance in the professions, the legal profession very much included. Indeed, the majority and dissenting opinions did not clash over this fundamental point; the majority was able to "assume arguendo that the remaining objectives . . . [of]

the special admission program . . . establish a compelling governmental interest." 18 Cal.3d, at 53. The end to racial prejudice, eradication of the barriers imposed by present and past discrimination, the integration of society—these are the stuff of an enlightened public policy agenda and properly occupy a high priority therein. We shall, therefore, briefly summarize some of the considerations which in our judgment make correction of the racial imbalance in the law schools and the legal profession a goal commanding urgent and priority attention.

In the first place, it is not open to doubt that the existing racial imbalance is substantial. Although blacks represent approximately 11.5% of the national population,[1] between 1% and 2% of the lawyers in this country are black.[2] Other minority groups, such as Chicanos, are even less well represented. See O'Neil, *Racial Preference,* note 2, *supra,* at 943; see also note 6, *infra.*

Our society, probably more than any other in the history of mankind, is now based on the rule of law. Various commentators have observed the unique influence and power of those possessed with a law degree in our society. As Newton Baker observed,

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1. In 1970, there were 22,539,362 black citizens of a total population of 203,210,158 or approximately 11.1%. United States Census, United States Bureau of the Census, Government Printing Office (1970) at 591, 593, tables no. 189, 190. The Census projection for 1976 in that there were 24,841,000 black citizens of a total population of 215,118,000 or approximately 11.5%. *Population Report Service,* United States Bureau of the Census, Services No. P 25 No. 643 (1976).

2. See Linn, *Test Bias and the Prediction of Grades in Law School,* 27 J. Leg. Ed. 293-94 (1975); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education* (hereafter "Preferential Admissions"), 80 Yale L. J. 699, 726-27 (1971); O'Neil, *Racial Preference and Higher Education: The Larger Context,* 60 Va. L. Rev. 925, 943 (1971) (hereafter cited as "Racial Preference").

> "[I]t may well be that great contributions to the institutional and constitutional development of our country have been initiated in the minds of philosophers but certainly the practical adaption of them and the adoption of them into the practice of the country have been brought about by using the body of the bar as the agency for popular advocacy of the exposition."[3]

Or, as stated less elegantly but more directly,

> "A legal career in this society is a vital pathway to positions of power. To deny effective access to the profession is to deny totally access to judgeships and to limit severely access to government, business and politics."[4]

Likewise, substantial exclusion from the professions translates into maldistribution of income, for the economic rewards of professional life substantially exceed national average income levels. See O'Neil, *Racial Preference, supra,* at 944.[5]

The impact of racial exclusion from the Bar upon the client community is equally serious. We quickly add that we, like Justice Douglas (*see DeFunis v. Odegard,* 416 U.S. 312, 342 (1974) (dissenting opinion), reject the proposition that the mission of a law school should be to create black

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3. Baker, "The Lawyers Function in Modern Society", published in The Lawyer's Treasury (Bobbs Merrill Co., N.Y., 1956), at 56.

4. L. Letwin, Some Perspective on Minority Access to Legal Education, Experiment and Motivation 10.

5. In today's society access to law school is the only meaningful access to the legal profession. It has been observed that

> "A student denied admission to law school is virtually denied admission to the profession. In 1974, more than thirty-three thousand persons were admitted to practice, of whom only four prepared by law office study."

Knauss, *Developing A Representative Legal Profession,* 62 A.B.A. J. 591, 593 (1976).

lawyers for black people. But it would be blind to fail to recognize that at this time in our history people frequently feel more comfortable working and living with people of similar backgrounds. *See, e.g., Austin Independent School Dist. v. United States,* .... U.S. ...., 97 S. Ct. 517, 518 (1976) (opinion of Powell, J.). Minority communities must, like the majority community, be given the opportunity to have full access to professionals whom they trust to understand their needs; the courts need not approve the private consideration of racial criteria in order to recognize the reality that it does exist. See *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* .... U.S. ...., 45 U.S.L.W. 4221, 4227 (March 1, 1977). And the preference of minorities for minority lawyers is hardly irrational. As Professor O'Neil has written:

> "While many white attorneys admirably serve minority clients, there is no substitute for a person from the community. Mr. Justice Brennan once remarked that black lawyers 'most clearly understand the problems and difficulties found by members of the Negro community.' The director of the ACLU Southern regional office has observed that many racially oppressive practices would have gone unchallenged but for the presence of native Southern black lawyers; even competent white lawyers 'would not have understood or would not have raised the racial issues.' In the Spanish-speaking and Indian communities, the role of the indigenous attorney is even more critical because of the language barrier which further impedes communications and understanding."[6]

6. O'Neil, *Racial Preference,* note 2, *supra,* at 944-45. Although the ratio of lawyers to general population in California is approximately 1:530, the ratio of Chicano lawyers to the Chicano population is 1:9,482. Reynoso, et al., *La Raza, the Law and the Law Schools,* 1970 U. Toledo L. Rev. 809, 816. Nationally, the ratio of lawyers to population is 1:625; but there is only one black attorney for every 7,100 black persons. O'Neil, *Racial Preference, supra,* at 943.

These various factors—and one other—were well summarized by Senator Brooke:

> "Recruitment of young lawyers from minority groups is vital for many reasons. Their environment in the legal fabric will ensure the development of responsible leadership with the communities they represent. As lawyers, they may enter such fields as government, business or education in addition to responding to the demands of their profession. More importantly they will provide guidance and inspiration to young members of their groups who will seek to emulate them."[7]

The last factor mentioned by Senator Brooke is not to be overlooked. The California Supreme Court included it among the interests it assumed to be compelling:

> "Minority doctors will, moreover, provide role models for younger persons in the minority community, demonstrating to them that they can overcome the residual handicaps inherent from past discrimination." (18 Cal.3d, at 52).

Likewise, the impact of racial imbalance is felt directly in the law schools. An all or nearly all white classroom is of a very different order than an integrated one. We put it that way rather than to say that minorities benefit from learning with whites, or that whites benefit from learning with members of minority races, because both are true. The Court long ago recognized, in the specific context of the law school, the crucial importance of the give and take of the classroom (*Sweatt v. Painter,* 339 U.S. 629 (1950)); it rightly observed that "[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which

7. Brooke, *Introduction to the Symposium,* 1970 U.Tol.L.Rev. 277.

the law interacts." *Id.*, at 634. To deny white students access to the ideas and experiences of other racial segments of society is to deprive the majority of much that the law school might otherwise be able to offer. It is, moreover, certain to increase the risk that these white students, when they become lawyers, will be less sensitive to the interests and concerns of minorities.[8]

We in the Bar deeply feel the impact of our own professional racial isolation. It diminishes the potential richness of our daily professional lives. Likewise, it impairs the ability of the organized Bar, which increasingly charts for itself a role deeply enmeshed in concerns of a broad public interest as respects the justice and legal system, to

8. Professor Sandalow states:

> "It has been a familiar idea at least since the time of Plato that those who govern need an understanding of the governed. . . . To a substantial degree . . . [this understanding] is . . . acquired by interaction among students, through exposure to differing points of view in class discussion and in less formal settings. Diversity in the student body contributes to student understanding of the variety of views which exist in contemporary America and helps develop their ability to develop and defend their own views. The absence of racial and ethnic minorities in law school, or their presence in very small numbers, may significantly detract from the educational experience of those students who are admitted.
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> ". . . . There is also a need to increase effective communication across racial and ethnic lines. Many white students, for example, need to learn to be able to disagree with blacks candidly and without embarrassment. I cannot imagine that any law teacher whose subject matter requires discussion of racially sensitive issues can have failed to observe the inability of some white students to examine critically arguments by a black, or the difficulty experienced by others in expressing their disagreements with blacks on such issues. Yet, these skills are not only a professional necessity, they are indispensible to the long-term well being of our society."

Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U.CHI.L.REV. 653, 684-86 (1975); see also Wasserstrom, *The University and the Case For Preferential Treatment*, 13 AM.PHIL.Q. 165 (1976).

carry out that function. Moreover, what Professor Sandalow recently wrote of the impact of blacks who join "Wall Street law firms, corporate law departments, labor union legal staffs, government agencies, or law faculties" applies no less to the Bar as a whole:

> "A black presence is likely to alter the behavior of these institutions in a host of subtle and perhaps not so subtle ways, making them more responsive to the varying needs of the black community." (Sandalow, note 8, *supra*, at 688).

There is, too, legitimate concern on the part of law school faculties and administrators that their own admissions standards may be culturally biased, unfair, discriminatory, or not adequately focused. In Part II(C), *infra*, at pp. 31-33, we discuss whether a case might be made that such criteria are in some instances unlawfully applied. But whether or not a court would ultimately condemn traditional academic admissions criteria ought not to be the only inquiry. It is enough to recognize that the law schools should be free to respond directly to their perception that something may be amiss when application of their own admissions standards dramatically excludes minority applicants.

Finally, there is the unshakable reality that the present racial imbalance in the law schools is the dismal legacy of more than two centuries of discrimination—prejudice and unfairness which have not yet fully abated. In Part II(C), *infra*, at 29-31, we inquire whether the University may be legally responsible for some of that prior discrimination. But, again, the inquiry cannot stop there. For even if the University of California is not responsible for prior discrimination, society as a whole cannot escape that burden of history. Minority admissions programs are a

voluntary response to the perceived need to make appropriate adjustments, as a partial remedy for undeniable injustice.

For all of these reasons, the elimination of the nearly all-white character of the Bar is, as the California Supreme Court assumed, an urgent requirement of the highest priority.

II.

The Decision of the Supreme Court of California Prevents the Correction of Racial Imbalance in the Law Schools and Legal Profession.

A. EXISTING ACADEMIC STANDARDS AND PROCEDURES, EVEN IF EDUCATIONALLY AND PROFESSIONALLY VALID, HAVE AS THEIR EFFECT THE EXCLUSION OF MINORITIES.

There simply cannot be the slightest doubt that continued utilization of existing academic admissions criteria—which for most major law schools place primary if not controlling weight upon an evaluation of undergraduate grades and scores on the Law School Aptitude Test ("LSAT")—will wholly fail to ameliorate the racial imbalance in the legal profession. As the brief *amici curiae* of the deans of the University of California's four law schools[9] demonstrated, law school admission standards have risen drastically since 1960. At the Berkeley campus (Boalt Hall), for example, an applicant in 1960 could secure admission with a "B" average in college work *or* an LSAT score in the mid-500's. In contrast, by 1976 the median LSAT score was 712 (out of 800) and the median grade point average was 3.66 (out of 4.0). Deans' Brief, at 8-9. As a consequence of these escalating standards, as well as the handicaps under which

9. Brief for Sanford H. Kadish, et al., as Amici Curiae, Feb. 11, 1977, filed herein in connection with the Petition for Certiorari (hereafter referred to as the "Deans' Brief").

minority applicants labor, the effect of the existing admissions standards is very nearly the total exclusion of minorities. At Boalt Hall, for example[10] in the past three years (1974-76) only *three* black and Chicano students were enrolled pursuant to the regular admissions process.[11] Such minority admissions as now exist in the law schools are, therefore, almost exclusively attributable to special admissions programs of the kind condemned in this case by the Supreme Court of California.[12] There is not the slightest basis upon which to suppose that, should this Court affirm and admissions thereafter be conducted pursuant to present-day academic standards, minority enrollment will again be other than *de minimis*. Indeed, it has been suggested that if anything the percentage of minority enrollment may decline. See O'Neil, *Preferential Admissions*, note 2, *supra*, at 741 & n. 151. At best, the dismal fact is that, as Professor O'Neil has observed:

> "Unless the number and paper qualifications of minority applicants were to increase disproportionately vis-a-vis majority applicants—a development which seems most unlikely under present conditions—perpetuation of traditional policies would effect no significant change in existing racial imbalances." (*Id.*)

10. There is at present no available data on the other California law schools. It is reasonable to presume that the picture is much the same at the other first-rank law schools.

11. See Deans' Brief, at 24. At Boalt, if a minority applicant is within the competitive range of the regular admissions procedure, they are first evaluated pursuant thereto. *Id.* During this three year period, a total of 605 white students were enrolled through the regular admission process. *Id.*, at 22.

12. The Boalt Hall faculty has conducted its minority admissions program in an open and candid manner. Thus the Deans' Brief forthrightly acknowledged to this Court that the Boalt Hall program "operates, in much the same way as the Davis program." *Id.*, at 24.

B. THERE ARE NO ALTERNATIVE MEANS PERMISSIBLE UNDER THE CALIFORNIA SUPREME COURT'S JUDGMENT CAPABLE OF ACHIEVING MEANINGFUL CORRECTION OF EXISTING RACIAL IMBALANCE.

The Supreme Court of California speculated that there are alternative techniques, not involving any consideration of race, which could result in a significant correction of racial imbalance.[13] 18 Cal.3d, at 53-57. With the utmost respect, there is no basis in the record, logic or experience upon which to base that hope. The University was guilty of no overstatement in its Petition for Certiorari in saying of these suggested alternatives that they

> "spring from the imagination of judges, not educators, and . . . carry no assurance that the state objectives will be served equally well or, indeed, even meaningfully at all." (*Id.* at 16.)

The harsh but indisputable fact is that these "alternatives" will not work. The hard choice which must be faced in this case is between programs of the kind under review and the almost total racial exclusion of minorities in the law schools and other professional schools and in the professions themselves. An examination of the "alternative means" which have been suggested permits no other conclusion.

(1) Affirmative Recruiting.

The court below suggested that "the University might increase minority enrollment by instituting aggressive programs to identify, recruit, and provide remedial schooling

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13. The court "assume[d] arguendo that the remaining objectives . . . [of] the special admission program . . . establish a compelling governmental interest" but concluded that the University had not shown that "the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority." *Id.*, at 53. We disagree that the "less detrimental means" test is properly applicable. See Part III(B), *infra*. The present discussion, however, merely is intended to show that as a practical matter the racial imbalance which application of existing standards causes cannot be ameliorated by the means posited by the California court or by any other means oblivious of race.

for disadvantaged students of all races . . . ." 18 Cal. 3d, at 55. In the first place, if the purpose is for affirmative recruiting efforts which are racially neutral and directed to "disadvantaged" persons rather than racial minorities, then it suffers the same flaws of other programs for "disadvantaged" students discussed on pp. 16-20, *infra*. But even if such a program resulted in an increase in applications by minority students, this would be a wholly inadequate substitute for a program of minority admissions. Recruiting efforts and post-admission remedial schooling are already a common feature of existing affirmative action programs. *See, e.g.*, Dean's Brief, at 13-14. Unless traditional academic standards are adjusted to eliminate the formidable barriers that now exist, all of the affirmative efforts to recruit qualified applicants can accomplish little in the way of racially integrating the law schools and legal profession.

(2) Expansion of the Number of Students Admitted.

The California Supreme Court also proposed that another "ameliorative measure" which "may be considered is to increase the number of places available in the . . . schools." 18 Cal. 3d, at 55. Even engaging in the doubtful assumption that such funds might be appropriated, there is no basis to suppose that any kind of an increase which might conceivably be possible could make a significant dent in the problem. If Boalt Hall's regular admissions averaged *one* black or Chicano student per year in the past three years, would an increase of 40% in the total enrollment of the entering class matter?

The suggestion that professional schools be expanded as a means of correcting the egregious racial imbalance in the professions would also require the expenditure of vast sums

of money that are simply not available. Nor is expansion necessarily otherwise needed. The immediate problem in the legal profession may lie not with the supply of lawyers but with the potential clients' lack of resources with which to retain counsel.[14] In light of the present underfunding of the legal services and legal aid sector, it is far from clear that we are training an insufficient number of lawyers nationally.

There is, in short, no reason whatever to hope that the number of persons admitted to accredited law schools[15] will increase significantly, or that they should increase significantly, or that if they were to increase significantly the problem of minority under-representation in the legal profession will be at all "ameliorated."

(3) Special Admissions for "Disadvantaged" Students.

Many have suggested that professional schools could maintain special admissions programs for persons of a

14. See, *e.g.*, Address of Chief Justice Warren E. Burger to American Bar Association quoted in Los Angeles Times, May 28, 1977, at p. 1; T. Goldstein, "Job Prospects For Young Lawyers Dim as Field Becomes Overcrowded," New York Times, Part C, May 17, 1977, at p. 1; L. Goodman and M. Walker, "The Legal Services Program: Resource Distribution and the Low Income Population (Bureau of Social Science Research, Inc. July, 1975), at 43-45.

15. It goes without saying that there is even less likelihood that the size of existing law schools will be expanded, especially that of the most highly regarded institutions. It is not our purpose to denigrate the quality of legal education which is available at any law school, but it goes without saying—as this Court long ago recognized—that not all law schools are equal. See *Sweatt v. Painter*, 339 U.S. 629 (1950). Whatever law schools are thought by anyone—the public, the profession, the academic community, or the editors of magazines which rank them (*see, e.g., Juris Doctor*, December, 1976, 1977, at 17)—to be in the first line, as well as those which are not, ought to be able voluntarily to achieve a meaningful integration of their students.

"disadvantaged" background.[16] The California Supreme Court appears to have placed primary reliance upon this approach as an "alternative means" to a minority admissions program. Thus it advocated that "[d]isadvantaged applicants of all races must be eligible for sympathetic consideration" by a process in which various factors, including the applicant's background, are considered.[17] See 18 Cal. 3d, at 55. In our judgment, the court's alternative suffers from several fatal flaws.

First, unless the court meant—and we do not imply that it did—to invite *sub rosa* disregard of its command that admissions be conducted without regard to race, the "disadvantaged" admissions program will fail to remedy racial imbalance to the extent that "disadvantaged" is not synonymous with "racial minority."[18] We assume that if the California court's judgment stands, universities will thereafter be obliged to refrain from consideration of race in evaluating whether an applicant is disadvantaged; the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson,* 307 U.S. 268, 275 (1939). Surely this Court would not embrace a rule of law which

16. *See, e.g.*, Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP.CT. REV. 1, 32.

17. The court said:
> "The University is entitled to consider . . . that low grades and test scores may not accurately reflect the abilities of some disadvantaged students; and it may reasonably conclude that although their academic scores are lower, their potential for success in the school and the profession *is equal to or greater than that of an applicant with higher grades who has been similarly handicapped.*" (*Id.*, at 54, emphasis added.)

18. The Davis program under review here was originally described as a program for disadvantaged applicants. The trial court found, and the University did not thereafter deny, that it was despite its label designed solely for minority applicants. See 18 Cal. 3d, at 44.

contemplates that, at a level of low-visibility, admissions personnel in the professional schools would be free to conceal impermissible consideration of race by describing it in other, less explicitly racial, terms.[19] In short, we unequivocally reject the suggestion that in the quest to eradicate the stains of past racial discrimination "we cannot afford complete openness and frankness on the part of the legislature, executive or judiciary." Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW.U.L.Rev. 361, 410 (1966). We agree with Professors Karst and Horowitz that "[i]n the context of affirmative action, both deception and evasion are ill-advised" and that the issue is whether there shall be "candid validation" of these remedial programs. Karst and Horowitz, *Affirmative Action and Equal Protection*, 60 VA.L.Rev. 955, 973-74 (1974).

Second, it is, of course, emphatically not the case that "minority" and "disadvantaged" persons describe substantially overlapping populations. While it is unhappily true that a substantial percentage of racial minorities are economically disadvantaged, it is *not* true that a majority of the economically disadvantaged are of racial minorities; in fact, of those under the poverty line in 1975, 31.3% were

19. One varient of this suggested approach, though not one permitted under the terms of the California Supreme Court's opinion, would allow the limited consideration of race "when it appears that it might have created a barrier which the [particular] applicant has had to overcome." Reddish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A. L. Rev. 343, 374 (1974). In this model, the ultimate objective would be racially neutral: "to find applicants who will be the best law students and/or lawyers." *Id.* 375. But this approach offers no assurance that the "best law students and/or lawyers" so identified will include minorities, for as Professor Reddish concedes "[i]f as a result of the approach few or no blacks or Chicanos are accepted, that is irrelevant." *Id.*

racial minorities and 68.7% were white. See U.S. Bureau of Census, *Statistical Abstract of the United States* (1976), 415, Table No. 673. To exacerbate the problem, it appears that a relatively high percentage of those minority applicants who are accepted under the present minority admissions program would not qualify as "disadvantaged" in a program which conscientiously does not consider race as such. See Sandalow, note 8, *supra*, at 691-92.

Third, while the sympathetic treatment of all "disadvantaged" persons may be a laudible goal, it is simply not the objective to which minority admissions programs are directed. In short, the California Supreme Court—having conceded that the objective of increasing *minority* admissions serves "compelling" governmental interests—has purported to quarrel only with the *means*, but in fact has questioned the *objective*. For if the objective of increasing *minority* admissions is legitimate, there can be no quarrel with means which achieve it directly simply because those means are not oblivious to race. For the same reason, an "alternative" is not compelled as less burdensome if it does not adequately achieve that objective merely because it does have the potential for achieving a different one. In other words, it is no answer to the law schools to say that while increasing minority admissions is a laudible—indeed, *compelling*—goal, they may not achieve it by means directed at admitting more minorities and instead must ignore minority status. And for the same reason, it is no answer to say that it is a constitutionally sufficient alternative that the law schools concentrate their affirmative efforts on "disadvantaged" persons if, as appears to be the fact, such programs if honestly administered will not result in the admission of a significant number of minority students.

Fourth, it remains to say that admission of "disadvantaged" persons of the white race does not begin to address the problems which continue to haunt this Nation as the unhappy legacy of slavery. The concerns to which the minority admissions programs addressed are summarized in Part I, *supra.* The admission of white students of disadvantaged backgrounds does not end the tragic racial isolation of this Nation, does not remedy the severe underrepresentation of minority lawyers in the ranks of the Bar, does not provide role-models for young boys and girls of minority families—in short, we are left as we are. To conclude that the Constitution mandates this result is to stand the constitutional hierarchy of values on its head; it is to ignore the special solicitude that the Court has found in the Constitution for the concerns, rights and interests of racial minorities not similarly reserved for the white majority however economically disadvantaged:

> "[Classifications based on wealth] have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." (*San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973)).

(4) More "Flexible" Admissions Standards.

Some have proposed that professional schools could revise their admissions standards and procedures. The California Supreme Court suggested that the schools grant personal interviews to each applicant, and place greater stress on such factors as "the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals." 18 Cal. 3d, at 54-55. Necessarily, less weight would be given to traditional criteria such as academic achievement and entrance examination scores. The kindest that can be said of this "alternative" is that as a suggestion for increasing minority admissions it reflects well-intentioned wishful thinking.

If "flexible" admissions standards were used in a fashion which in fact took account of race in the guise of considering such factors as "character," "recommendations," or "matters relating to the needs of the profession and society," it would of course be precisely what the California Supreme Court has said may not be done directly. For the same reasons that preferential programs for "disadvantaged" applicants could not be used as a subterfuge for minority admissions programs, so too would "flexible" admissions standards have to be administered in a racially neutral manner. See Part II(B)(3)(*First*), *supra.*

Administered without regard to the race of any applicant, a "flexible" admissions program of this kind may well produce an entering class *academically* unlike the class produced by traditional standards which heavily weight grades and entrance examination scores. But without consideration of race, it is simply not the case that the *racial* composition of the class will be significantly altered. For there is no reason to suppose that a fairly administered and colorblind evaluation of hundreds or thousands of applicants, with consideration of such factors as motivation, career objectives,[20] and the like, along with grades and

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20. The California Supreme Court suggested that applicants "of whatever race" affirming an intention to practice in a community of "disadvantaged minorities" could properly be given admissions preference. 18 Cal. 3d, at 56. We altogether fail to understand how a professional school can be barred from considering the *race of applicants* yet be authorized to consider the *race of potential patients or clients* of those applicants.

examination scores, will miraculously increase the number of minority students enrolled.[21]

On this score, there can be no escape from the conclusion of the law school deans:

> "The influence in the admissions process of undergraduate grades and test scores can be reduced but that does not eliminate the gap in academic measures between the top layer of whites and the main group of minority applicants. In order to overcome this handicap, minority applicants would have to appear stronger than these whites on the nonacademic factors to be given extraordinarily enlarged significance relative to grades and test scores. They would also have to rank higher, on average, than the enormous mass of whites, at roughly the same academic level, most of whom do not now even apply. (Deans' Brief, at 26-27.)

All that such a program will do, apart from imposing an extraordinary administrative burden upon the schools,[22] is alter the characteristics of the white persons admitted.

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21. To the contrary, *see, e.g., Rowe v. General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972).

22. We recognize that the administrative burden of an alternative is itself an insufficient justification for forbidden classifications. See *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Califano v. Goldfarb*, ... U.S. ....., 45 U.S.L.W. 4237, 4240 & n. 6 (1977). There can be no doubt, however, that the burdens of evaluating and interviewing the massive numbers of applicants who presently apply to the major professional schools would be overwhelming. Boalt Hall, for example, considered 3,365 applicants in 1976, admitted 671 persons, and enrolled 293 students. Deans' Brief, at 10. The central point, however, is that in this case race is not used as a surrogate for some more elusive factor which would be administratively burdensome to ascertain; compare *Califano v. Goldfarb, supra*, where the Court rejected the use of sex as a surrogate for "needy." Minority admissions programs seek to expand the number of minority admissions for the reasons summarized in Part I, *supra*, and in the belief that an increase in the number of minority persons admitted to the schools and added to the professions is itself an important and positive objective.

Whether that would be desirable or undesirable is a matter of intense and ongoing academic debate. For example, it is entirely possible that "flexible" admissions standards would in practice operate to the benefit of persons whose qualities are most quickly perceived in an interview—charm, wit, verbal ability, and the like—to the detriment of others with important qualities—concentration, high motivation, ability to do profound and thoughtful work—which would presently be reflected in traditional academic measurements. It is also arguable that the departure from more objective traditional admissions criteria would result in preference for upper-middle class applicants whose letters of recommendations and backgrounds will be impressive to admissions committees.

These concerns are, of course, the primary province of the schools. The core of the problem with this suggested "alternative" is that, like the suggested program for "disadvantaged" applicants, it is addressed to a different agenda. Because, as the California Supreme Court assumed, the admission of an increased number of minorities is a legitimate and compelling objective, alternatives which alter the mix of applicants without directly achieving that objective are, in fact, not alternatives at all. See Part II(B)(3) *(Third), supra*. To the precise extent that they do anything other than increase the number of minority applicants, then (although they may, measured against other objectives, be entirely meritorious) they are irrelevant to the problem of avoiding near total racial isolation in professional schools.

We conclude our comments about the utter inadequacy of the various suggested "alternatives" with a final observation. We thought long and hard about those proposed alternatives before coming to the firm conclusion that they simply are not adequate to the challenge. We recognize that

our State's highest court, whose commitment to racial justice is unquestioned, thought otherwise. But support for the California Supreme Court's assertion cannot be found either in the record or in the voluminous literature on this much-discussed question. The analysis in the preceding pages and the informed judgment of thoughtful law school deans and scholars[23] convince us that there is no meaningful alternative. But whatever residuum of doubt there may be ought to counsel against the sweeping conclusion which that court has reached. The Supreme Court of California has cast aside educational admissions policies adopted by faculties which have been convinced of their necessity; in doing so, it speculated—without record or scholarly support—that other means were available, at tolerable cost, in service of the same end. But the judiciary has no special competence in such matters. *See, e.g., San Antonio Independent School District v. Rodriguez,* 411 U.S. 37, 42 (1973). Surely the less restrictive alternative principle was never meant to authorize the invalidation of governmental activity upon an unsupported though well-intentioned judicial speculation that a concededly important—indeed, compelling—governmental purpose can be served by some other untested means.[24] The stakes in this case are too high to risk what no responsible person could deny is at least the significant possibility—if not, as we think, the near certainty—that the suggested alternative means are destined to fail.

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23. *See, e.g.,* Deans' Brief, at 17-29; O'Neil, *Racial Preference,* note 2 *supra,* at 951-53; O'Neil, *After De Funis: Filling the Constitutional Vacuum,* 27 U. FLA. L. REV. 315, 340-42 (1975).

24. That much seems implicit in the usual statement of the less restrictive means principle that invalidates restrictions "when the end *can* be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960) (emphasis added).

C. TECHNIQUES WHICH ARE PERMITTED AND OFTEN REQUIRED TO CORRECT RACIAL IMBALANCE CAUSED BY ILLEGAL CONDUCT SHOULD ALSO BE CONSTITUTIONALLY AVAILABLE TO PROFESSIONAL SCHOOLS VOLUNTARILY SEEKING TO ELIMINATE RACIAL IMBALANCE.

The Supreme Court of California has in this case drawn a curious, unworkable, and exceedingly burdensome line. On the one hand it acknowledges, as it must, that in a broad variety of contexts this Court and the lower courts have not only permitted but indeed *compelled* the consideration of race in the fashioning and administration of remedies for illegal segregation or discrimination.[25] On the other

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25. See 18 Cal.3d, at 46, 57. The court distinguished the numerous cases decided under Title VII of the Civil Rights Act of 1964 on the ground that there had been a finding "that the defendant had practiced discrimination in the past and that the preferential treatment of minorities was necessary to grant them the opportunity for equality which would have been theirs but for the past discriminatory conduct." *Id.,* at 57 .

There can be no doubt, of course, that race-conscious means may, and where required must, be utilized to correct the effects of unlawful race discrimination. This Court has unequivocally so declared. *See, e.g., Swann v. Board of Education,* 402 U.S. 1, 19-20 (1971); *North Carolina Board of Education v. Swann,* 402 U.S. 43, 45-46 (1971); *United States v. Montgomery County Board of Education,* 395 U.S. 225 (1969); *Louisiana v. United States,* 380 U.S. 145, 154 (1965). Thus this Court said in *North Carolina Board of Education v. Swann, supra,* of a statute, on its face "neutral", forbidding the assignment on account of race:

> "[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the requirement of *Brown v. Board of Education,* 347 U.S. 483. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." (402 U.S., at 45-46).

As the Chief Justice pointed out in *McDaniel v. Barresi,* 402 U.S. 39, 41 (1971):

> "The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children. . . . To have done otherwise would have severely hampered the board's ability to deal effectively with the task

hand, it forbids the use of admission techniques which—together with other relevant factors—take account of race as a means to eliminate otherwise unavoidable racial im-

at hand. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."

With this mandate, and compelled by the common sense of the matter, the courts of this Nation have not hesitated to fashion remedies which explicitly take account of race once unconstitutional discrimination has been found. Such remedies are commonly employed in desegregation cases. *See, e.g., United States v. Jefferson County Bd. of Ed.*, 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (1967), *cert. denied sub nom. Caddo Parrish School Bd. v. United States*, 389 U.S. 840 (1967); *Keyes v. School Dist. No. 1, Denver*, 521 F.2d 465, 475-77 (10th Cir. 1975); *Kelly v. Guinn*, 456 F.2d 100, 110 (9th Cir. 1972). Race consciousness is also utilized in hiring of teachers and replacement of those displaced by desegregation orders. *Adams v. Rankin County Board of Education*, 485 F.2d 324 (5th Cir. 1973); *Lee v. Macon County Bd. of Ed.*, 453 F.2d 1104 (5th Cir. 1971); *McLaurin v. Columbia Municipal Separate School Dist.*, 478 F.2d 348 (5th Cir. 1973); *United States v. Jefferson County Bd. of Ed., supra; Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969) (en banc).

Likewise, race-conscious remedies are the norm for unconstitutional race discrimination in employment by public entities. *See, e.g., Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n.*, 482 F.2d 1333 (2d Cir. 1973); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); *Erie Human Relations Comm'n v. Tullio*, 493 F.2d 371 (3d Cir. 1974); *Pennsylvania v. O'Neil*, 348 F.Supp. 1084 (E.D. Pa. 1972), *aff'd*, 473 F.2d 1029 (3d Cir. 1973).

Race-conscious remedies are also permitted and required where there has been a violation of a statute prohibiting race discrimination. For example, as the California Supreme Court acknowledged, a wealth of authority so holds where there has been a violation of Title VII (42 U.S.C. §§ 2000e *et seq.*). *See, e.g., Franks v. Bowman Transportation, Inc.*, 424 U.S. 747 (1976); *United States Masonry Association of Memphis, Inc.*, 497 F.2d 871, 874, 877 (6th Cir. 1974); *N.A.A.C.P. v. Allen*, 493 F.2d 614, 617, 622 (5th Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 548, 554 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971); *United States v. Wood Wire & Metal Lathers International Union, Local No. 46*, 471 F.2d 408 (2d Cir.) *cert. denied*, 412 U.S. 939 (1973); *United States v. Local Union No. 212*, 472 F.2d 634 (6th Cir. 1973); *United States v. Intern. Union of Elevator Const.*, 538 F.2d 1012, 1018-19 (3d

balance in the professional schools. Thus, were a minority litigant able to prove to the satisfaction of a court that the Davis Medical School had discriminated against minorities

Cir. 1976); *Commonwealth of Pennsylvania v. Sebastian*, 368 F.Supp. 854 (W.D. Pa. 1972) *aff'd* 480 F.2d 917 (3d Cir. 1973) (en banc); *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970); *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc); *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 399 (2d Cir. 1973); *United States v. T.I.M.E.—D.C.*, 517 F.2d 299 (5th Cir. 1975); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Carpenters Local No. 169*, 457 F.2d 210 (7th Cir.) *cert. denied*, 409 U.S. 851 (1972); *United States v. IBEW Local No. 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *Asbestos Workers Local No. 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. Local 46, Lathers*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Rios and United States v. Local 638, Steamfitters*, 501 F.2d 622 (2d Cir. 1974); *Buckner v. Goodyear Tire and Rubber Co.*, 476 F.2d 1287 (5th Cir. 1973).

Lower courts have invoked racial distinctions in such other contexts as urban renewal, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968); and broadcast license renewal, *TV 9, Inc. v. FCC*, 495 F.2d 929, 935-37 (D.C. Cir. 1973).

It is significant that the Court has not distinguished between cases in which the unlawful discrimination offended the more stringent constitutional standard (*compare Washington v. Davis*, 426 U.S. 299 (1976) *with Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)) and mere statutory violations; even though the discrimination violates a statute and not the Constitution, a race-conscious remedy is permitted and, where necessary, required. *See, e.g., United Jewish Organizations of Williamsburgh, Inc. v. Carey*, ... U.S. ....., 45 U.S.L.W. 4221 (March 1, 1977). In that case, the Court upheld the use of racial criteria by the State of New York in attempting to comply with the requirements of the Attorney General pursuant to the Voting Rights even though the statute "is not dependent upon proving past unconstitutional apportionments" (*id.*, at 4225) and, as noted in Justice Brennan's concurring opinion, there had been no "finding of purposeful [and hence, under *Washington v. Davis*, unconstitutional] discrimination." *Id.* at 4230 n.6. And while it is true that, as Justice Brennan there observed, the factors which made the Voting Rights Act applicable to New York were matters which "often would afford probative evidence of purposeful discrimination" (*id.*), the substantial racial imbalance in the Davis Medical School which, absent the affirmative action program, would have existed would likewise have provided "probative evidence"—assuredly not conclusive, but nonetheless probative of discrimination.

in violation of the United States Constitution, the California Constitution,[26] Title VI of the Civil Rights Act of 1964, or any other relevant antidiscrimination law, an affirmative action program of the kind condemned by the California Supreme Court in this case would not only be permissible but *mandatory*. And once unlawful discrimination is found, the School would not be permitted to offer the court the vague promise of "less detrimental" (18 Cal.3d, at 53) means of achieving desegregation such as more aggressive minority recruiting, increasing the size of the student body, and consideration of "non-racial" criteria such as the applicant's willingness to practice in "disadvantaged minority"

26. Article I, Sections 11 and 21 of the California Constitution forbids discrimination by the State. As this Court knows, the California Supreme Court has frequently declared that the California Constitution is a document of dignity and meaning independent of, and in some respects more protective than, the United States Constitution. *See, e.g., People v. Longwill,* 14 Cal.3d 943, 951 n.4 (1975); *People v. Disbrow,* 16 Cal.3d 119, (1976); Comment, *The New Federalism: Toward a Principled Interpretation of the State Constitution,* 29 STAN. L. REV. 297 (1977); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 CALIF. L. REV. 273 (1973); Note, *Rediscovering the California Declaration of Rights,* 26 HAST. L. J. 481 (1974). The "equal protection" provisions of Article I, Sections 11 and 21 have several times been given an independent construction. *See, e.g., Brown v. Merlo,* 8 Cal.3d 855 (1973); *Raffaelli v. Committee of Bar Examiners,* 7 Cal.3d 288 (1972); *Curtis v. Board of Supervisors,* 7 Cal.3d 942, 951 (1972); *Sailer Inn v. Kirby,* 5 Cal.3d 1 (1971); *Serrano v. Priest,* 5 Cal.3d 584 (1971), 18 Cal.3d 728, 761-66 (1976) (the second opinion explicitly rejecting, as applicable to the California Constitution, this Court's analysis of the Fourteenth Amendment in *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973)); *Crawford v. Board of Education,* 17 Cal.3d 280 (1976). It remains to be seen, for example, whether the California Supreme Court will hold, as this Court did in *Washington v. Davis, supra,* that a violation of guarantee of equal protection requires proof of purposeful discrimination. The court has, in fact, rejected the requirement of showing that segregation was purposeful in the context of the public elementary and secondary schools. See *Crawford v. Board of Education, supra; compare Keyes v. School District No. 1,* 413 U.S. 189 (1973).

communities.[27] Once illegality has been established, the obligation of the court and the School is to adopt a plan which "promises realistically to work, and promises realistically to work *now*." *Green v. School Board of New Kent County,* 391 U.S. 430, 439 (1968).

In short, the California Supreme Court has mandated that the professional schools of California administer their student admissions in a colorblind fashion unless they have violated the law, in which event they will be obliged to do precisely the opposite, explicitly considering race as a means of expeditiously obliterating the effects of that illegality "root and branch." *Green v. School Board of New Kent County, supra,* at 438. These diametrically opposed commands will function in hopeless and burdensome tension, for the line which the California Supreme Court has drawn is impossibly vague, turning as it does on whether a court will or will not conclude that the racial imbalance which exists in any given classroom or school is the result of illegality.

It is true, of course, that no court has ever said that the University of California, or its Medical School at Davis, or any of its several law schools has violated any antidiscrimination law. The record provides no ready guide to what a court presented with such a claim might conclude. It is, however, appropriate to observe that the substantial racial imbalance in the Davis Medical School and in other California professional schools, coupled with other potentially pertinent factors, makes the question far from frivolous.

In the first place, in evaluating compliance with the Constitution and the Civil Rights Act, the University—which

27. The patent inadequacy of these "alternatives" was discussed in Part II(B) of this Brief, *supra.*

is, of course, part of the State of California—cannot be judged in isolation. Presumably a court judging the legality of its admissions programs would be obligated to consider the fact that throughout the State public elementary and secondary school systems—in which minority applicants to the University receive their formative education—have been found to be unlawfully segregated or imbalanced. Racial segregation of children in California's schools was initially mandated by state statute.[28] While such legislatively imposed segregation no longer exists, judicial findings of *de jure* segregation are commonplace and increasing in number.[29] Minority children in California have not only

28. The School Law of California, passed April 4, 1870 (Stats. of Calif., 1869-70, at 838-39) provided: "Every school . . . shall be open for the admission of all white children. . . . The Education of children of African descent and Indian children, shall be provided for in separate schools." Ignoring pleas by the plaintiffs "that persons of African descent have been downgraded by an odious hatred of caste" the elimination of which "was the object of the Fourteenth Amendment," the California Supreme Court upheld this provision in *Ward v. Flood*, 48 Cal. 36, 39 (1874). Separate schools for Indian students were likewise upheld in *Piper v. Big Pine School Dist.*, 193 Cal. 664 (1924)), and a parallel statute required *inter alia* separate schools for "Chinese," "Japanese," and "Mongolian" children (Calif. Education Code § 8003 (Deering, 1943). "Separate but equal" remained the rule of law in California until that 1947 decision by the United States Court of Appeals for the Ninth Circuit in *Westminister School Dist. Orange Co. v. Mendez*, 161 F.2d 774 (9th Cir. 1947). Governor Earl Warren then signed legislation repealing the remaining segregation statutes. See 1947 Cal. Stats, c. 737, § 1. See also *Lee v. Johnson*, 404 U.S. 1215 (1971) (Douglas, J., in chambers). See Wollenberg, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA'S SCHOOLS, 1855-1975 (University of California Press, 1975) at 108-135.

29. *See, e.g., Crawford v. Board of Education of the City of Los Angeles*, 17 Cal.3d 280 (1976) (*de jure* finding by trial court, affirmed on other ground); *Soria v. Oxnard School Dist.*, 386 F. Supp. 539 (C.D. Cal. 1974); *Hernandez et al. v. Board of Education of Stockton Unified School Dist.*, Civ. No. 101016, San Joaquin Super. Ct. (Oct. 9, 1974); *Spangler v. Pasadena City Bd. of Education*, 311 F.Supp. 501 (C.D. 1970); *Mendez v. Westminister School Dist. Orange Co.*), 64 F.Supp. 544 (S.D. Cal. 1946), *aff'd* 161 F.2d 774 (9th Cir. 1947). In addition, a sizable number of other school districts have been found in violation of Title VI of the Civil Rights Act of 1964 by the United States Department of Health, Education and Welfare. *See Brown v. Weinberger*, 417 F.Supp. 1215, 1222-24 (D.D.C. 1976). Such racial segregation has not been limited to students but includes staff and faculty as well. *See, e.g., Spangler v. Pasadena City Bd. of Education, supra*, 311 F.Supp. at 513-517.

been segregated by schools but have also been "misplaced" because of their race into classes for "slow" children and for the emotionally and mentally retarded.[30] And they have sometimes been placed in classes taught in a language they cannot understand. *Lau v. Nichols*, 414 U.S. 563 (1974).[31]

Moreover, existing professional school admissions standards may be vulnerable to successful legal challenge. There is no doubt that the standards employed at Davis apart from the minority admissions program significantly excluded minorities (C.T. 216-28), just as the existing law school admissions standards exclude minorities. See Part

30. *Larry P., et al. v. Riles*, 343 F.Supp. 1306 (N.D. Cal. 1972), *aff'd* 502 F.2d 963 (9th Cir. 1974); *Diana, et al. v. State Bd. of Ed.*, Civil No. C-70 37 RFP (N.D. Cal. June 18, 1971); *Spangler v. Pasadena City Bd. of Education, supra; Covarrubias v. San Diego Unified School Dist.*, Civil No. 70-394-S (S.D. Calif. Aug. 21, 1972); *Arreola v. Santa Ana Unified School Dist.*, Civil No. 160-577 (Orange Co. Super. Ct., June 7, 1968).

31. Race discrimination in California has of course not been confined to education. *See, e.g., Mulkey v. Reitman*, 64 Cal.2d 529 *aff'd* 387 U.S. 369 (1967) (housing); *Oyama v. State of California*, 322 U.S. 633 (1948) (property ownership); *Korematsu v. United States*, 323 U.S. 214 (1944) (liberty); *United States v. Operating Engineers, Local 3*, 4 C.C.H. Empl. Prac. Dec. ¶ 7944 (N.D. Cal. 1972) (employment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (business licenses); *Penn. v. Stumpf*, 308 F.Supp. 1238 (N.D. Cal. 1970) (employment); *Van Davis v. County of Los Angeles*, 7 C.C.H. Empl. Prac. Dec. ¶ 9087 (C.D. Cal. 1973) (employment); *Western Addition Community Organization v. Alioto*, 340 F.Supp. 1351 (N.D. Cal. 1972) (employment); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.) *cert. denied* 404 U.S. 984 (1971) (employment); *Ho Ah Kow v. Nunan*, 12 Fed. Case 252 (No. 6546) (Field J.) (liberty); *Castro v. State of California*, 2 Cal.3d 223, 230-231 (1970) (voting).

II(A), *supra*. Those standards place substantial if not controlling weight upon grades and scores of professional entrance exams.

The University adopted the minority admissions program at Davis because "as the chairman of the school's admission committee explained . . . the 'objective' academic credentials . . . did not accurately predict [a] minority applicant's qualifications and did not provide an equitable basis for comparison with other applicants." 18 Cal.3d, at 83 (Tobriner, J., dissenting). As a number of the commentators have noted, similar built-in racial bias may well exist in the traditional admissions criteria used by law schools: the LSAT and gradepoint average. There is little question that strict reliance on LSAT and gradepoint averages has a devastating impact upon racial minorities which all but guarantees an end result of segregated law schools. See Evans and Reilly, *A Study of Speededness as a Source* of Test Bias, 9 JOURNAL OF EDUCATION MEASUREMENT 123-31 (1972); Baird, *Blacks in Graduate and Professional School, Findings,* vol. 1, no. 2 (Princeton, N.J.: Educational Testing Service, 1974) at 5. Serious and as yet unanswered questions exist as to the predictive reliability of these criteria as to law school performance or the actual practice of law. See generally, Goolsby, *A Study of the Criteria for Legal Education and Admission to The Bar,* 20 J. LEG. ED. 175 (1967); Hoyt, *The Relationship Between College Grades and Adult Achievement: A Review of the Literature* (Iowa City, Iowa: American College Testing Program, 1965); Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissable by Traditional Criteria,* 170 U. TOL. REV. 321; *cf.* Price, et al., *Performance Measures of Physicians* (University of Utah 1963); *Defunis v. Odegaard,* 416 U.S. 312, 327-

331 (1974) (Douglas, J., dissenting); *cf. Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

The issue of whether the University—together with other parts of the State of California—may be found to have violated the law and thus obliged to adopt a race-conscious remedy of the kind condemned by the court below is not before this Court. The issue was, of course, not litigated by either party, for neither of them had an incentive to do so. See 18 Cal.3d, at 60 n. 29. But if the line is to be drawn between schools whose racial imbalance is the result of illegality and those where it is not, litigants willing and able to raise that question will not be long in coming.

But such a line ought not be drawn. That line requires an adjudication of illegality before a professional school, faced with substantial racial imbalance caused at least in part by the application of its own standards and in additional part by conditions for which the State cannot wholly escape responsibility, can voluntarily take meaningful corrective steps. It invites if it does not compel litigation as a condition precedent to voluntary problem solving—and, we need hardly remind this Court, litigation of the most costly, time-consuming, court-congesting, and too often community-dividing kind.[32] Yet the California Supreme Court's decision, if permitted to stand, ties the hands of responsible faculties and school administrators. Even though faced with unmistakable racial imbalance, they are restrained from adopting the very remedies which a court would *compel* unless and until it can be determined that the racial

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32. For example, the Los Angeles school desegregation litigation was commenced in 1963. Only a few months ago—almost thirteen years later—the Supreme Court of California affirmed the Superior Court's judgment, and remanded the case for further proceedings on the question of remedy. *Crawford v. Board of Education,* 17 Cal.3d 280 (1976).

imbalance has its roots in illegality. Indeed, even if a lawsuit were brought, the school could not confidently agree to a consent decree which included necessary race-conscious remedies, for non-parties would not be precluded from asserting in a separate suit that there was in fact no prior illegal discrimination and hence the remedy embodied in the consent decree was unlawful. Moreover, because no judgment can bind a non-party, even a decision of a trial court in a contested case could not effectively resolve the question. Thus the duty or entitlement of a professional school to utilize a race-conscious remedy could never be established until a finding of illegality was confirmed by the highest appellate court and thus, through *stare decisis* though not *res judicata*, made binding upon potential challengers not party to the suit.

The California Supreme Court has itself compellingly articulated the reasons why a line of this kind cannot be tolerated. In *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937, 956-57 (1971),[33] the Court said:

> "If we were to hold section 1009.5 constitutional other than as applied to districts manifesting de jure segregation, we would risk [the] 'danger of an uncertain or vague future application of the statute' for the definition of de jure segregation has not been settled, nor its perimeters ascertained, and a school board could not definitively determine whether or not

33. The dilemma to which the court spoke in *Johnson* was quite similar to that which it created in this case. There, the issue was the meaning of a state "anti-busing" law which arguably could have been interpreted to forbid the assignment of students to schools beyond reasonable walking distance from their homes. The court first held that such a law could not constitutionally be applied to situations in which unconstitutional segregation existed. It then considered the argument that the law could nonetheless be interpreted to forbid such assignments in situations where no illegal segregation exists and rejected that approach for the reason explained in the portion of the opinion quoted above.

> section 1009.5 applied to its district. The courts have not drawn a clear distinction between de facto and de jure segregation. . . . The weighing of the motive and effect of board decisions stretching back for many years to arrive at a net determination of the de facto or de jure character of the present structure presents a highly difficult and possibly insoluable task.
>
> "As a consequence of the above factors, any effort to determine the extent of de jure segregation in California would encounter enormous difficulty. . . . Most school districts in California have not attempted to determine the character of segregation within their bounds, and any such determination would necessarily turn upon the uncertain definition of that elusive concept.
>
> "Thus under the current pattern of court decisions, neither school districts nor lower courts can determine with any confidence whether a pattern of school segregation should be classed as de facto or de jure. Consequently, if we held section 1009.5 unconstitutional only as applied to districts of de jure segregation, no school board in California . . . could ascertain whether section 1009.5 could constitutionally apply within its district. Such a holding would, therefore, entail uncertain enforcement of section 1009.5, a confusion which would inhibit and delay school boards in their efforts to bring about full equality of educational opportunity. The *Green* decision calls for desegregation now; a statute which imports confusion and delay in the uprooting of de jure segregation violates both the rule prohibiting partial enforcement of legislation, when such enforcement entails the danger of vague future application, and the mandate of the Supreme Court of the United States."

In the past several years, professional schools in California and elsewhere have adopted affirmative action pro-

grams in an effort responsibly to deal with the racial imbalance resulting from existing admissions policies. Doubtless in part as a consequence, they have in the main not been compelled to devote their energies and resources to the defense of lawsuits challenging their admissions standards and procedures. We think that the faculties and administrators of professional schools should be permitted to deal, responsibly and subject to appropriate safeguards and judicial review,[34] with the racial imbalance which the application of conventional admissions criteria produces. Perhaps that racial imbalance would ultimately be held by a court to be the result of actionable illegality; perhaps it would not. The line between illegal discrimination on the one hand and legally tolerable, but indisputably unacceptable, racial isolation on the other seems to us to be too ephemeral—and in the final analysis too inconsequential —to be the determining factor upon which the availability of voluntary corrective techniques depends.

In either case—that is, whatever the cause—substantial racial imbalance and the virtual exclusion of racial minorities from the professional school produces the same harmful *effects*. See Part I, *supra*. So severe are those effects that some have concluded that racial imbalance even though not caused by purposeful segregative acts is unconstitutional.[35] This case presents no occasion to reconsider that

34. See Part III, *infra*.

35. Two members of this Court have said that it is the *duty* of school officials to remedy substantial racial imbalance whether borne of *de jure* segregation acts or otherwise. See *Keyes v. School District No. 1*, 413 U.S. 189, 214 (Douglas, J.), 217 (Powell, J.) (1973). Indeed, interpreting the California Constitution the Supreme Court of California has reached that very conclusion as the elementary and secondary schools. *Crawford v. Board of Education*, 17 Cal.3d 280, 289-302 (1976); see also *San Francisco Unified School District v. Johnson, supra*, at 955-58; *Jackson v. Pasadena City School District*, 59 Cal.2d 876 (1963).

question, for the issue here is not whether professional schools which find racial imbalance of unadjudicated origins *must* utilize race-conscious remedial techniques but only whether the Constitution forbids them from voluntarily doing so.

The conclusion of the court below that it does is wholly at odds with dozens of thoughtful decisions (including those of the Supreme Court of California) upholding the explicit consideration of race in voluntary programs for remedying racial imbalance in the public elementary and secondary schools[36] and in programs adopted by government agencies

36. *See, e.g., San Francisco Unified School District v. Johnson, supra*, at 951; *Offermann v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *Youngblood v. Board of Instruction of Bay County, Fla.*, 430 F.2d 625, 630 (5th Cir. 1970) ("At this point, and perhaps for a long time, true nondiscrimination may be attained, paradoxically, only by taking color into consideration"); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (1967), *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840 (1967); *Wanner v. County School Board*, 357 F.2d 452 (4th Cir. 1966); *Springfield School Committee v. Banksdale*, 348 F.2d 261 (1st Cir. 1965). *Norwalk CORE v. Norwalk Board of Education*, 298 F. Supp. 213 (D.Conn. 1969), *aff'd.*, 423 F.2d 121 (2d Cir. 1970); *Olson v. Board of Education*, 250 F. Supp. 1000 (E.D.N.Y. 1966); *Fuller v. Volk*, 230 F. Supp. 25 (D.N.J. 1964); *Guida v. Board of Education*, 26 Conn. Supp. 121, 213 A.2d 843 (1965); *Tometz v. Board of Education*, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968); *Booker v. Board of Education*, 45 N.J. 161, 212 A.2d 1 (1965); *Morean v. Board of Education*, 42 N.J. 237, 200 A.2d 97 (1964); *Van Blerkom v. Donovan*, 15 N.Y.2d 399, 259 N.Y. Supp. 2d 825 (1965); *Vetere v. Allen*, 15 N.Y. 2d 259, 258 N.Y. Supp. 2d 77 (1965), *cert. denied*, 382 U.S. 825; *Balaban v. Rubin*, 14 N.Y. 2d 193, 250 N.Y. Supp. 2d 281 (1964), *cert. denied*, 379 U.S. 881 (1964); *DiSano v. Storandt*, 22 App. Div. 2d 6, 253 N.Y. Supp. 2d 411 (1964); *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967); *School Committee of Boston v. Board of Education*, 352 Mass. 693, 227 N.E.2d 729 (1967), *app. dismissed*, 389 U.S. 572 (1968). Indeed, in *Swann v. Board of Education*, 402 U.S. 1, 16 (1971), this Court said:

> "School authorities are traditionally charged with broad process to formulate and implement educational policy and

for their own employment activities or by private employers in compliance with government requirements[37] which are applicable even though there is no proof of prior discrimination by the employer.[38]

The California Supreme Court's opinion attempts to distinguish the school cases on the ground that a child assigned on racial grounds to a school other than that of the student's or his family's choice at worst suffers an "inconvenience" because "no child is totally deprived of an education because he cannot attend a neighborhood school . . . ." 18 Cal.3d, at 46. In contrast, it is said, Bakke was wholly denied "a professional education." *Id.*, at 47. With all respect, this understandable attempt to distinguish so solid a body of judicial authority will not wash.

In the first place, it is not necessarily the case that a white denied access to a professional school of his or her first choice will be faced with "the absolute denial of a pro-

might well conclude, for example, that in order to prepare students to live in pluralistic society each school should have a prescribed ratio of Negro to white students representing the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities, absent a finding of a constitutional violation; however, that would not be within the authority of a federal court."

37. *See, e.g.*, Exec. Order No. 11,246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303, and the implementing regulations, 41 C.F.R. § 60-2 *et seq.*

38. *See, e.g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. den.*, 404 U.S. 854 (1971); *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St.2d 35, 249 N.E. 2d 907 (1969), *cert. den.*, 396 U.S. 1004 (1970). *Cf. Associated General Contractors of Massachusetts v. Altschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. den.*, 416 U.S. 957 (1974); *Joyce v. McCrane*, 320 F.Supp. 1284 (D.N.J. 1970).

fessional education." *Id.* Mr. DeFunis, for example, was originally denied admission to the University of Washington but was accepted by several other law schools, including the excellent law school at the University of Oregon. See O'Neil, *Racial Preference*, note 2, *supra*, at 930. Secondly, the grievance of the white child or parent compelled to attend a school in some other part of town (perhaps so distant that transportation is necessary) is scarcely chimerical. The anger and protest generated by some desegregation programs, particularly those including substantial busing of children, is ample evidence that some of the citizens of this country feel deeply that they are injured by assignments of this nature. To them it will be no answer to say that the explicit consideration of race in designing the new attendance zones in the school's integration program does not constitute "the absolute denial" of the child's education.

If, as the California Supreme Court thought, it truly is impermissible to consider race in the conduct of public education, then these numerous cases are unfathomable. *Brown v. Board of Education*, 347 U.S. 483 (1954) long ago decided that the state may not invidiously consider race in the assignment of students to schools—even though the school to which minority students is assigned is "equal" in terms of faculty and facilities. The cases which uphold the use of race in assigning students for purposes of voluntarily remedying racial imbalance cannot, therefore, be disposed of as involving only the question of *which* school a pupil will attend. Likewise, the "executive order" cases (see note 38, *supra*) cannot be distinguished on the ground that the disappointed white job applicant has not been injured by the affirmative action program. See O'Neil, *Racial Pref-*

erence, supra, at 931. Unless they too are to be swept aside—and this Nation even more deeply imprisoned in the existing patterns of racial separation—these cases must be recognized as authorizing the limited consideration of race as a voluntary remedy for existing racial imbalance. The constitutional principles which support this conclusion, and their application to minority admissions programs, are discussed in the next section of this Brief.

III.

Because the Correction of Racial Imbalance Is a Substantial and Compelling Objective, Programs Which Consider the Race of Minority Applicants as a Means of Attaining That Objective Do Not Violate the Equal Protection Clause and Are Constitutional.

A. PREFACE: CERTAIN FEATURES AND STANDARDS WHICH ARE REQUIRED OF ANY AFFIRMATIVE ACTION PROGRAM.

In the following section of this Part III, we shall describe what we believe to be the applicable constitutional standard against which the constitutionality of minority admissions programs should be judged. But before doing so, we believe it necessary to define what we have in mind by the term "minority admissions program" and, further, to indicate certain essential features and standards which we think must be present in any such program.

(1) Academic Competence of All Admittees.

In Part II(A), *supra,* we showed that a variety of factors, wholly unrelated to potential professional competence, have pushed minimum law school entrance requirements to unreasonably high levels. Many able, exceptionally competent lawyers who have served the public and their clients with distinction for fifteen or more years would today be unable

to meet the entrance requirements of their own law schools. On the other hand, minority applicants who fifteen years ago would have satisfied the admissions criteria today would, under the present day standards, be rejected.

An affirmative action program which permitted the admission of persons who fail to meet reasonable, objective professional and academic criteria would be indefensible. It would work an injustice upon the students themselves, for those who in fact lack the necessary skills would be unable to pass bar examinations appropriately designed for the protection of the consumers of legal services. And, to the extent that bar examinations might fail to exclude all who in fact are not competent to practice law, the clients themselves would suffer. We would not support such a program nor, we trust, would any responsible law faculty or administrator.

That, happily, is not this case. The record reflects (see C.T. 67)—and the majority opinion below does not deny—that no student was admitted pursuant to the program who was not fully qualified to meet the requirements of a medical education at Davis.[39] The same is true at Boalt, where those selected under special admissions programs are in fact well above the minimum predicted passing level (see

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39. Thus, as Justice Tobriner pointed out:
"[T]he medical school did not by any means accept all minority students who applied for admission; in 1973, the school *granted interviews* to only one-third of the special admission applicants, and in 1974 only one-sixth of such applicants were interviewed. Moreover, no minority applicant was admitted into the medical school without being found fully qualified for medical school study by the *same* admissions committee that passed on all other applicants." (18 Cal.3d, at 82 (dissenting opinion).)

Deans' Brief, at 23).[40] Fidelity to this standard of academic competence is essential.[41]

(2) Openly Described, and Explicitly Stated, Standards and Procedures.

The standards and procedures observed in the operation of a minority admissions program ought to be candidly stated by the school. See Gellborn and Hornby, *Constitutional Limitations on Admissions Procedures and Standards —Beyond Affirmative Action,* 60 VA. L. REV. 975, 1002-06 (1974). A school should not mask a program which in fact is designed to benefit racial minorities by use of a misleading label. In this respect, the program at Boalt is entirely forthright. See Deans' Brief, Appendix A.

(3) Termination When Necessity Ceases.

In Part III(B), *infra,* we set out the constitutional criteria against which we believe a minority admissions program must be judged. One of those criteria is that a substantial governmental interest be served. For the reasons set forth in Part I of this Brief, we think that present day conditions amply establish the necessity.

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40. The explicit policy of the faculty is that "[i]n no event shall an applicant be admitted unless it appears that there is a high probability that he or she will be able to complete successfully the course of instruction at Boalt Hall." Deans' Brief, Appendix A. In the period from 1969 through 1973, a total of 273 blacks and Chicanos were enrolled, and 226 graduated. See Deans' Brief, at 16. Thus it appears that the faculty policy has been adhered to.

Of these graduates, 181 took the California bar exam. During the period when these classes took the bar exam (July, 1972-75), the passing rate for examinees from all law schools ranged from 42.9% to 61.7% and averaged 56.2% for that period. See 51 CALIF. STATE BAR J. 514 (1976). The Boalt black and Chicano graduates passed at a rate well *above* the average: 118 passed, representing 65.1% (See Deans' Brief, at 16).

41. When academic competence is, as it has been, a fundamental ingredient of a minority admissions program, it provides a fully effective refutation of the suggestion that minority students admitted thereunder bear a "stigma" of professional inferiority. See also Part III(B), *infra.*

We are, however, entitled not only to hope but assume that the conditions of necessity are not permanent. It would be naive to suppose that the effects of more than two centuries of racial injustice, as they impact upon the professional school admissions process, will be eradicated quickly. But in time they will be eradicated. And it is important that it be understood at the outset that minority admissions programs are but a transitional device—a remedy—to attain that day. See Karst and Horowitz, *Affirmative Action and Equal Protection,* 60 VA. L. REV. 955, 972 (1974); see also *Associated General Contractors of Massachusetts v. Altschuler,* note 38, *supra* at 18 n.16. As those conditions of necessity cease to apply, the faculties and administrators of the professional schools must be obliged to adjust and ultimately to terminate the minority admissions programs.[42] Their failure to do so will, of course, be subject to judicial oversight and correction under the applicable constitutional standards.

B. AFFIRMATIVE ACTION PROGRAMS DESIGNED TO REMEDY RACIAL IMBALANCE, LIMITED AS DESCRIBED HEREIN, ARE CONSTITUTIONAL BECAUSE THEY SERVE IMPORTANT GOVERNMENTAL OBJECTIVES AND ARE SUBSTANTIALLY RELATED TO ACHIEVEMENT OF THOSE OBJECTIVES.

In its opinion below, the California State Supreme Court concluded that classifications based on race are subject to strict scrutiny regardless of whether such classifications are designed to burden or to benefit racial minority groups.

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42. An illustration of this principle occurred recently at Boalt Hall. Asian applicants were included among the original targets of that school's program. In 1975, after a review of the data, the faculty concluded that Japanese-Americans were gaining admission in appropriate proportions pursuant to the regular admissions process. Accordingly, applicants of Japanese-American ancestry were eliminated from the minority admissions process. See Deans' Brief at 25 n.8.

18 Cal. 3d, at 50-51. However, in concluding that racial classifications are always suspect, the majority of the California Court failed adequately to consider the historical purpose of the "suspect classification" principle and the class indices which this Court has identified as giving rise to this extreme degree of judicial scrutiny. We suggest that the remedial nature of an appropriately designed and operated minority admissions program (see Part III (A), *supra*) makes invocation of the strict scrutiny doctrine inappropriate.

In the now-famous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1937), this Court began to articulate a principled basis for departure from general principles of judicial restraint in passing on the constitutionality of legislation. Justice Stone observed that "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Essentially the *Carolene Products* footnote suggests that judicial deference may be inappropriate where majoritarian political processes cannot be relied upon for the protection of "discrete and insular minorities".

Subsequent decisions have expanded upon the *Carolene Products* concept, identifying as suspect classifications based on race (*Loving v. Virginia,* 388 U.S. 1, (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964)), alienage (*In Re Griffiths,* 413 U.S. 717 (1973); *Graham v. Richardson,* 403 U.S. 365, (1971)), and national origin (*Hernandez v. Texas,* 347 U.S. 475, (1954)). Each of these classifications has involved in the imposition of burdens upon certain groups

who "as a class are a prime example of a 'discrete and insular minority' ". *Graham v. Richardson,* supra, 403 U.S. at 372. In *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973) Justice Powell, writing for the majority, explicitly articulated the "indices of suspectness" in rejecting the conclusion that wealth is a suspect classification:

> "The system of alleged discrimination and the class it defines have none of the traditional indices of suspectness: *the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness* as to command extraordinary protection from the majoritarian political process." (*Id.,* at 28, emphasis added).

The argument for "strict scrutiny" of the use of race as one factor considered in an admissions program designed to benefit racial minorities is far weaker than the argument for strict scrutiny of classifications made on the basis of sex which the Court has several times declined to adopt. *Compare Frontiero v. Richardson,* 411 U.S. 677 (1973) (plurality opinion, favoring strict scrutiny of gender-based classifications) *with Stanton v. Stanton,* 421 U.S. 7, 14-15 (1975) (applying more tolerant standard of review) and *Craig v. Boren,* ..... U.S. ....., 97 S.Ct. 451 (1976). The arguments for strict scrutiny of classifications burdening women include a powerful claim that women have been the victims of a "long and unfortunate history of set discrimination" and even today "face pervasive . . . discrimination in our educational institutions, in the job market and, perhaps most conspiciously, in the political arena." *Frontiero v. Richardson, supra,* 411 U.S., at 684, 686. But not even that

much can be said for a classification which benefits racial minorities and allegedly burdens whites.[43]

The white majority possesses none of the "traditional indices of suspectness" which have led to heightened judicial protection for blacks, aliens, and Mexican-Americans. American whites have not been relegated to the political powerlessness which commands "extraordinary protection from the majoritarian political process."[44] *San Antonio Independent School District v. Rodriguez, supra,* at 28. Nor would anyone seriously assert that the racial majority in our country has been "subjected to . . . a history of purposeful unequal treatment. . . ." *Id.;* see also *Hunter v. Erickson,* 393 U.S. 385, 391 (1969).

Moreover, measures such as the special admissions program of the U.C. Davis Medical School are intended to benefit the very same minority groups historically protected by strict judicial scrutiny of suspect classifications. It would be bitterly ironic and utterly illogical now to use

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43. The only element this case has in common with classifications this Court has found to be presumptively unconstitutional is that an immutable trait—race—is the basis of the classification. But this Court has never held that classifications based on immutable traits require a strict scrutiny analysis. *See, e.g., Labine v. Vincent,* 401 U.S. 532 (1971) (illegitimacy); *Levy v. Louisiana,* 391 U.S. 69 (1968) (illegitimacy); *Craig v. Boren, supra* (sex).

44.

> "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks."

Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. Chi. L. Rev. 723, 735 (1974).

that review mechanism to strike down programs designed to aid its originally intended beneficiaries. See *Alevy v. Downstate Medical Ctr.,* 384 N.Y. Supp. 2d 82, 89 (1976).

Finally, the fear that has sometimes been expressed that certain kinds of classifications may "stigmatize" a particular group (see *United Jewish Organization of Williamsburgh v. Carey, supra,* at 4229 (Brennan, J., concurring)) is not an appropriate concern here. Obviously, a minority admissions program "represent[s] no racial slur or stigma with respect to whites. . . ." *Id.,* at 4227 (plurality opinion). Nor, since it is designed to benefit minorities, does it slur those groups. It may well be that, in the short term, the existence of affirmative action programs will unreasonably cause some persons to perceive minority students as of a lower academic order. But in fact neither the fears of minority students that they may not be "authentic" (McPherson, *The Black Law Student: A Problem of Fidelities,* Atlantic, Apr. 1970, at 93, 99) nor any patronizing attitudes of whites would be justified so long as all students admitted are academically qualified for the professional curriculum. See Part III(A)(1), *supra,* especially at notes 39-40. There is, therefore, no answer to this argument advanced in an *amicus* brief submitted in *De Funis:* "Minority students should not be foreclosed from a legal education simply because of the possibility that some whites might misunderstand the reasons for, and function of, a minority admissions program." Brief of Legal Aid Society of Alameda County, et al., at 62. As Professor O'Neil has said, "it would be perverse if a court were to strike down on this ground a program which had been sought and extensively utilized by minority applicants themselves. Such a judgment would imply a dangerously gratuitous concern about the welfare of minority groups." O'Neil, *Racial Preferences,* note 2, *supra,* at 941.

The California Supreme Court appears to have perceived that only two tests of constitutionality were available: the deferential "rational basis" test and the highly demanding "compelling state interest" test. Classifications examined under the relaxed rational basis standard have, of course, been rarely rejected, while those subjected to strict scrutiny seldom survive; as Professor Gunther has said, the latter test is "strict in theory and fatal in fact."[45]

We need not advocate the use of the rational basis test urged by Justice Tobriner's dissent. Classifications based on race, however well-intentioned, involve potential risks. As Justice Brennan observed in his *Williamsburgh* concurrence, ostensibly remedial racial classifications "may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries." *Id.*, at 4229. Any standard of review must be adequate to pierce surface appearances and detect actual claims of that nature. Accordingly, we are persuaded that remedial racial classifications "should be subjected to more careful scrutiny than traditional standards of rationality ordinarily invoke." *Alevy v. Downstate Medical Ctr., supra,* 384 N.Y.Supp. 2d, at 89-90.

We think these considerations counsel application of an intermediate standard of review, such as that recently applied by the Court to classifications by gender in *Craig v. Boren, supra,* at 407:

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45. Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). As the Chief Justice has said:

> "To challenge [state policies] by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly unsurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." (*Dunn v. Blumstein,* 405 U.S. 330, 363-64 (1972) (dissenting opinion)).

> "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and be substantially related to the achievement of those objectives."

Even prior to *Craig,* commentators had noted a departure from the traditional two-level approach in certain opinions of this Court,[46] and have suggested that such an intermediate level of review exists. *See, e.g.,* Gunther, note 45, *supra.* But this case does not require the Court to revise a standard of judgment which had previously been applied to a particular classification; the prior cases of this Court treating racial classifications as suspect and therefore requiring strict scrutiny uniformally involved classifications which burdened a "discrete and insular" racial minority. Because this case does not, it therefore presents an unresolved question. For the reasons stated, the intermediate standard of review provides a proper accommodation of the various interests at stake; it involves no undue judicial deference and yet refrains from imposing undue burdens upon legitimate and important programs.

Significantly, in applying this intermediate standard of review to cases involving claims of gender based on discrimination, the Court has acknowledged the legitimacy of lines drawn for the purpose of *remedying* the effects of "the long history of discrimination against women." *Califano v. Webster,* .... U.S. ...., 45 U.S.L.W. 3630 (March 21, 1977). In that case, the Court sustained "differing treatment of men and women [in relation to certain Social Security benefits which] was not 'the accidental byproduct of a traditional way of thinking about females' . . . but rather was

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46. *See, e.g., Stanton v. Stanton,* 421 U.S. 7, (1975); *Jimenez v. Weinberger,* 417 U.S. 628, (1974); *James v. Strange,* 407 U.S. 128 (1972); *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

deliberately enacted to compensate for particular economic disabilities suffered by women." *Id.*, at 3631. Likewise, a statutory benefit available only to widows was upheld in *Kahn v. Shevin,* 416 U.S. 351 (1974) because it was "designed to rectify the effects of past discrimination against women . . . ." *Id.*, at 355 n.8. These cases have special relevance to affirmative action programs in the professional schools which are responsive to, and designed to be remedial of, the burdens of past discrimination borne by racial minorities in America. See p. 11, *supra.* "After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself . . . because the resulting inequalities make new opportunities less accessible." *Associated General Contractors of Massachusetts, Inc. v. Altschuler,* 490 F.2d 9, 16 (1st Cir. 1973). Thus the use of special admissions programs to prevent continued racial isolation in the law schools, bench and bar is essential as a "partial prescription to remedy our society's most intransigent and deeply rooted inequalities." *Id.*

Judged by this standard,[47] a minority admissions program such as that described in Part III(A), *supra,* is constitutional. The objective serves concededly "important governmental interests." See Part I, *supra;* 18 Cal.3d, at 53. And the means chosen are not only "*substantially* related to the achievement of those objectives" but, in fact, are

47. Indeed, we believe that even judged by the compelling governmental interest standard which the strict scrutiny test would require, the minority admissions program is constitutional. That follows from (1) the conclusion—not questioned by the California Supreme Court's majority—that such programs are addressed to a compelling governmental interest (18 Cal.3d, at 53); and (2) the lack of any meaningful alternative to race-conscious remedial programs. (See Part II(B), *supra.*

precisely and directly focused upon their attainment. See Part II(B), *supra.*

CONCLUSION

The challenged program is constitutional, and the judgment of the Supreme Court of California should be reversed.

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Respectfully,

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